United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1893

To be argued by
GEORGE A. HAHN

In The

United States Court of Appeals

For The Second Circuit

GEORGE FELDMAN, Trustee in Bankruptcy of LEASING CONSULTANTS INCORPORATED, Bankrupt,

Plaintiff-Appellee,

- against -

FIRST NATIONAL CITY BANK,

Defendant-Appellant.

BRIEF FOR PLAINTIFF-APPELLEE

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

GEORGE FELDMAN, as Trustee in Bankruptcy of
LEASING CONSULTANTS INCORPORATED, Bankrupt,

Plaintiff-Appellee,

against

FIRST NATIONAL CITY BANK,

Defendant-Appellant.

On Appeal From the United States District Court
For the Southern District of New York

74-1893

BRIEF OF PLAINTIFF-APPELLEE

Preliminary Statement

Defendant appeals from an order and judgment entered on June 4, 1974 based upon a decision [A80-A94] rendered by Honorable Arnold Bauman, District Judge, United States Court, Southern District of New York, in Feldman v. First National City Bank, 368 F. Supp. 1333 (S.D.N.Y. 1974).

Statement of Case

This is an action by a trustee in bankruptcy using his status under §70c of the Bankruptcy Act, 11 U.S.C. §110c, to invalidate, pursuant to §503c of the Federal Aviation Act of 1958, 49 U.S.C. §1403c, the assignments of three aircraft leases by the bankrupt lessor (conditional vendor) to defendant bank, and to recover the post bankruptcy proceeds of the assigned leases. The complaint (A4-A35) contains four causes of action. Each of the first three causes of action relates to the assignment of a different aircraft lease. The fourth cause of action, which relates to a different transaction, has been settled between the parties and is not a subject of this appeal.

After service of the complaint, defendant made a motion to dismiss pursuant to Rule 12 of the Federal Rules of Civil Procedure on the grounds that the complaint failed to state claims upon which relief could be granted and that the action was time barred by §11e of the Bankruptcy Act (A36-A37). Plaintiff cross moved for summary judgment pursuant to

Rule 56 of the Federal Rules of Civil Procedure (A38-A39). The Court, Bauman, J., granted summary judgment for the plaintiff-trustee on the issue of liability, but referred the case to a Magistrate for determination as to damages. The parties thereafter stipulated as to the damages and the Magistrate adopted the stipulation as his report. The court then approved the report and judgment for plaintiff-trustee was entered on June 11, 1974. Defendant appeals from that judgment.

Statement of Issues

1. Was the bank required to file the three assignments for recordation with the Administrator of the Federal Aviation Administration under the provisions of the Federal Aviation Act of 1958 and the Regulations promulgated thereunder in order for such assignments to be valid against the assignor's trustee in bankruptcy?

2. Are the three aircraft leases in fact contracts of conditional sale as defined by the Federal Aviation Act of 1958 and the Regulations promulgated thereunder?

3. If the assignments of the lease/conditional sale contracts are invalid against the assignor's trustee in bankruptcy, does the taking of possession of the writings and/or the filing of U.C.C. financing statements give the bank a perfected security interest in the monetary obligations due under those writings?

4. Are the trustee's causes of action subject to the two year limitation contained in §11e of the Bankruptcy Act?

The Facts

On August 18, 1970, Leasing Consultants Incorporated (hereinafter "LCI") filed a petition for arrangement under Chapter XI of the Bankruptcy Act in the United States District Court for the Eastern District of New York (A40). LCI was adjudicated a bankrupt on October 16, 1970 (A40) and George Feldman, plaintiff-appellee, was appointed and qualified as trustee (A41).

On or about December 15, 1969, LCI and First National City Bank (hereinafter "FNCB") executed a loan and security agreement (A58-A74), pursuant to which FNCB agreed to lend money to LCI in connection with LCI's business of purchasing equipment and leasing it to customers (A59). LCI agreed to assign and deliver such leases to FNCB and to grant FNCB a continuing security interest therein as well as in the leased property itself (A60). This case involves three aircraft leases assigned and delivered to FNCB by LCI.*

The first cause of action. On or about March 5, 1970, LCI, as lessor, and Vieques Air Link, Inc. ("Vieques"), as lessee, executed an "aircraft lease" (A12-A17, A41) covering a Piper aircraft registration number N4818S (the "Vieques lease") (A41). LCI has purchased the aircraft for $27,878.00. (A41). The lease was for a sixty month term and required the

* FNCB filed U.C.C.-1 financing statements against LCI on December 30 and 31, 1969 with the New York Secretary of State and the Registrar of the City of New York, Queens County, adequately describing its collateral. Subsequent thereto, but prior to the assignments of the Vieques and True leases, LCI moved its only place of business in the State from Queens to Nassau County. If the court finds U.C.C. recordation relevant (the trustee believes it to be irrelevant) the recordation is inadequate. See N.Y.U.C.C. §9-401(c).

lessee to make monthly payments of $662.10 (A14, A41). The total rentals were $39,726.00 (A41, A49). LCI granted Vieques an option to purchase the aircraft for $1,393.90 (A15, A41). The option price was prepaid (A15, A41). On or about June 23, 1970 LCI executed and delivered an assigment of the Vieques lease to FNCB (A18, A19, A42). Neither the lease nor the assignment thereof were filed for recordation with the Administrator of the Federal Aviation Administration (hereinafter the "Administrator") (A42) as required by 49 U.S.C. §1403.

The second cause of action. On or about December 8, 1969, LCI, as lessor, and Raffa Van Atta, Ltd. ("Raffa"), as lessee, executed an "aircraft lease" (A20-A25, A42) of a Beechcraft aircraft, registration number N558SB (the "Raffa lease"). LCI had purchased this aircraft for $43,800.00. (A43, A50). The lease was for a sixty month term and required the lessee to make monthly payments of $1,093.25 (A22, A43). The total rentals were $65,595.00 (A43). LCI gave Raffa an option to purchase the aircraft for $4,380.00 (A24, A43). The option price was prepaid (A24, A43). On or about December 29, 1969, LCI executed and delivered an assignment of the Raffa lease to FNCB (A26, A27, A43). Neither the lease

nor the assignment thereof were filed for recordation with the Administrator (A44).

Third cause of action. On or about March 2, 1970, LCI, as lessor, and James W. True, as lessee, executed an "aircraft lease" (A28-A33, A44) covering a Piper aircraft, registration number N2996R (the "True lease"). LCI had purchased this aircraft for $24,070.00 (A44, A52). The lease was for a sixty month term and required the lessee to make monthly payments of $571.66 (A31, A44). The total rentals were $34,299.60 (A44). LCI granted True an option to purchase the aircraft for $2,407.00 and one half of the option price, $1,203.50, was prepaid (A32, A45). On or about July 24, 1970, LCI executed and delivered an assignment of the True lease to FNCB (A34, A35, A45). On or about September 10, 1970 the lessee paid out the lease for the sum of $24,226.93 (A45, A48). FNCB has admitted receiving $23,438.06 (A56) on or about September 23, 1970 (A2). Neither the lease nor the assignment thereof were filed for recordation with the Administrator (A45).

Point I

FNCB'S FAILURE TO FILE THE "ASSIGNMENTS" WITH THE ADMINISTRATOR MAKES THEM INVALID AGAINST THE TRUSTEE

A. The "assignments" are conveyances invalid against the trustee because they were not filed for recordation with the Administrator. "Any conveyance which affects the title to, or any interest in any civil aircraft of the United States" is subject to recordation with the Administrator. Federal Aviation Act of 1958 §503(a)(1), 49 U.S.C. §1403(a)(1). The statute further states, inter alia:

> "No conveyance ... the recording of which is provided for by subsection (a) of this section shall be valid in respect to such aircraft ... against any person other than the person by whom the conveyance ... is made or given, his heir or devisee, or any person having actual notice thereof, until such conveyance ... is filed for recordation in the office of the Administrator; ..." Federal Aviation Act of 1958 §503(c); 49 U.S.C. §1403(c).

The term "conveyance" is then defined:

> " 'Conveyance' means a bill of sale, contract of conditional sale, mortgage, assignment of mortgage, or other instrument affecting title to, or interest in,

property." Federal Aviation Act of 1958 §101 (17); 49 U.S.C. §1301(17).

Further elucidation of the term "conveyance" is found in regulations promulgated by the Administrator pursuant to the authority of Federal Aviation Act of 1958 §503(g), 49 U.S.C. §1403(g).

> "Applicability. This subpart applies to the recording of the following kinds of conveyances:
> (a) A bill of sale, contract of conditional sale, assignment of an interest under a contract of conditional sale, mortgage, assignment of mortgage, lease, equipment trust, notice of a tax lien, or other instrument affecting title to, or any interest in, aircraft." 14 F.C.R. §49.31(a).

B. The three leases are contracts of conditional sale as defined by Federal Aviation Act of 1958 §101(16), 49 U.S.C. §1301(16). See infra, at 23-25. The assignment of an interest under a contract of conditional sale is expressly included in the definition of "conveyance" under the regulations. 14 C.F.R.§49.31(a). There are even specific instructions in the regulations for recordation of the assignment of a vendor's interest under a contract of conditional sale.

See 14 C.F.R. §49.17(d)(2). These instructions apply to the three assignments FNCB failed to file.

C. Assuming arguendo that the leases are true leases, the assignments thereof are conveyances requiring recordation. The court below found it unnecessary to decide whether the three leases were conditional sale contracts because in a companion case, decided at the same time (Feldman v. Chase Manhattan Bank, N.A., 368 F. Supp. 1327 (S.D.N.Y. 1974) on appeal No. 74-1277), the court had ruled that the assignment of a true lease was a recordable conveyance invalid against the trustee if unrecorded.

The assignment of a true lease creates a chattel paper* security interest, just as does the assignment of a chattel mortgage or the assignment of a conditional sale contract. See the Official Comment to U.C.C. §9-308. The assignment of a mortgage is clearly a recordable conveyance, Federal

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* U.C.C. §9-105(b) defines "chattel paper" as a writing or writings which evidence both a monetary obligation and a security interest or a lease of specific goods..."

Aviation Act of 1958 §101(17), 49 U.S.C. §1301(17),* and so is the assignment of a lessor's interest under a conditional sale contract, 14 C.F.R. §§49.31(a)** and 49.17(d)(2). Judge Bauman found that the assignment of a true lease was a "conveyance which affects...[an] interest in" an airplane. Feldman v. Chase Manhattan Bank, N.A., supra, 368 F. Supp. at 1332. He reasoned:

> "It would seem incontrovertible that the statutory language "conveyance which affects ...any interest in" an airplane should encompass an assignment of a lease. Clearly the present possessory right and the entitlement to rentals conferred by a lease agreement are property "interests" as the term has been generally understood; less than "title" perhaps, but "interests" nonetheless. It then follows that assigning a lease "affects" the lessor's interest by transferring its primary incident, the right to receive rentals.

Judge Bauman's reasoning finds support in the development

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* See page 8, supra.

** Under 14 C.F.R. §49.31(a) contracts of conditional sale, mortgages and leases are all "conveyances."

of the chattel paper concept under the Code. There can be no reasonable basis to distinguish between the clearly mandated recording of assignments of aircraft mortgages and assignments of aircraft conditional sale contracts on the one hand and the assignment of an aircraft lease. This is particularly true since all three forms of chattel paper are subject to recordation.* See 14 C.F.R. §49.31(a).

Moreover, Congress clearly intended that all instruments affecting title to or interests in aircraft be recorded so that anyone dealing with an aircraft can rely on the record to reveal all enforceable interests and encumbrances on the aircraft and the holders of such interests or encumbrances. The frequent difficulty in distinguishing the precise nature of any particular instrument labeled "lease," mortgage" or whatever further serves to indicate that the statutory language was intended to be all encompassing.

D. The trustee is a third person without actual notice. It is well settled that under Bankruptcy Act §70c,11 USC §110c, the trustee is a hypothetical lien creditor without actual knowledge. Fifth Third Avenue Trust Co. v. Kennedy,185 F.2d 833, 835(2d Cir.1950); Hoffman v. Cream-O-Products,180 F.2d 649,650

* Under 14 C.F.R.§49.31(a) contracts of conditional sale, mortgages and leases are all "conveyances."

(2d Cir. 1950), cert.denied 340 U.S.815 (1950). See 4A Collier on Bankruptcy, ¶70.53, n.10 (14th ed.1973). It is obvious that the §70c trustee is not a party to the contract and is not an heir or devisee of any such party. Thus the assignments are invalid as to the trustee. Federal Aviation Act of 1958 §503(c), 49 U.S.C. §1403(c).

E. The trustee has standing to invalidate the assignments. FNCB maintains that §503c, 49 U.S.C. §1403c, protects only bona fide purchasers and mortgagees, and does not benefit the trustee "as an execution or attachment creditor" of LCI. Appellant's Brief at 23, 26, 27. This is not borne out by the statutory language, or the rules governing the lien of an attachment or execution creditor.

The language of Federal Aviation Act §503(c), 49 U.S.C. §1403(c), is clear and unambiguous. It declares an unrecorded conveyance invalid

> "...against any person other than the person by whom the conveyance or other instrument is made or given, his heir or devisee, or any person having actual notice thereof..."

A judgment lien creditor normally prevails over the holder of an unperfected security interest in personalty. In the United States, the bulk of priority disputes over personalty between the holders of unperfected security interests and judgment lien creditors are decided under Article 9 of the Uniform Commercial Code. U.C.C. §9-301 leaves no doubt about the priorities between a judgment lien creditor and the holder of an unperfected security interest:

> "(1) Except as otherwise provided in subsection (2), an unperfected security interest is subordinate to the rights of ...
>
> "(b) a person who becomes a lien creditor without knowledge of the security interest and before it is perfected."

Subsection (2) deals with purchase money security interests and is not applicable at bar. "Lien creditor" is also defined in that section.

> "(3) A 'lien creditor' means a creditor who has acquired a lien on the property involved by attachment, levy or the like and includes...a trustee in bankruptcy from the date of the filing of the petition....Unless all the creditors represented had knowledge of the security interest such a representative of creditors is a lien creditor without knowledge even though he personally had knowledge of the security interest."

Thus if FNCB's chattel paper security interest is invalid or unperfected, and the Code determined the priorities between the Trustee and FNCB, the Trustee would prevail. The same is true under pre-Code statutes dealing with various forms of security devices. See Fifth Third Union Trust Co. v. Kennedy, supra, Hoffman v. Cream-O-Products, supra, Empire State Chair Co. v. Beldock, 140 F. 2d 587 (2d Cir. 1944), cert. den. 322 U.S. 760 (1944); White v. Steinman, 120 F. 2d 799 (2d Cir. 1941), cert. den. 314 U.S. 657 (1941).

The rights of a judgment lien creditor to a debtor's personal property are therefore superior to the rights of the holder of an unperfected security interest in that property. That being the case, there can be no doubt but that the trustee can enforce his superior posture in the courts. In light of this history, if Congress had intended to achieve a different result by enacting §503(c), it would have chosen appropriate language. There are statutes under which a judgment lien creditor cannot invalidate an unrecorded mortgage. New York Real Property Law ("RPL") §291

is such a statute. See United States v. Certain Lands, 44 F. Supp. 830, 832 (EDNY 1972); United States v. Certain Lands, 41 F. Supp. 636, 637 (EDNY 1971); Trenton Banking Co. v. Duncan, 86 N.Y. 221 (1881). The operable statutory language appears below.*

Congress' failure to clearly limit the benefit of §503(c) to subsequent purchasers, assignees, mortgagees and like persons, to the exclusion of judgment lien creditors, indicates that such a limitation was not intended. By use of the language "any person other than..." and then specifically defining those excluded, Congress made manifest that "any person" encompasses everyone not falling within the excluded class. and therefore includes judgment lien creditors. In construing a similar phrase the Court of Appeals

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*RPL §291 provides, inter alia: "Every such conveyance not so recorded is void as against any person who subsequently purchases or acquires by exchange or contracts to purchase or acquire by exchange, the same real property or any portion thereof, or acquires by assignment the rent to accrue therefrom...in good faith and for a valuable consideration, from the same vendor or assignor, his distributees or devisees, and whose conveyance, contract or assignment is first duly recorded...".

for the Fourth Circuit stated that the term "...'third parties without notice' includes subsequent creditors, whether lien creditors or not." Friedman v. Sterling Refrigerator Co., 104 F.2d 837, 840 (4th Cir. 1939). The Trustee as a lien creditor certainly has standing to maintain this suit.

FNCB's argument that RPL §291 aids its cause, Appellant's Brief at 26, 27, is incredible. RPL §291 is limited to bona fide purchasers and mortgages only because that statute narrowly defines the protected class.

FNCB contends that:

> "Section 503(a)(1) has been construed to require the recording of conveyances only as against subsequent bona fide purchasers or mortgagees or others holding a contractual security interest in the aircraft itself, without notice of the prior interest. Southern Jersey Airways, Inc. v. National Bank of Secaucus,* supra, pp. 403-404; Marrs v. Barbeau, ___ Mass. ___, 146 N.E.2d 353 (1957);** Marshall v. Bardin, 169 Kan. 534, 220 P.2d 187 (1950)."
>
> Appellant's Brief at 26.

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* 108 N. J. Super 369, 261 A2d 399 (1970).

** 336 Mass. 416

None of the three cases cited, however, is authority for such a proposition. The Southern Jersey case, supra, involved a conflict between a statutory possessory lien and a recorded mortgage. (See also Industrial National Bank of Rhode Island v. Butler Aviation International, Inc., 370 F. Supp. 1012 (E.D.N.Y.1974) also involving a dispute between a possessory lien and a recorded mortgage.) These cases limit the effect of §503(d),* regarding the validity of recorded conveyances, rather than unrecorded conveyances, as at bar. The Marrs and Marshall cases, supra, involve conflicts between attaching creditors and subsequent bona fide purchasers for value. The principle of these cases is that "an attachment creditor acquires no greater right in the property than the defendant in the attachment owned...." Marshall v. Bardin, supra, 220 P.2d at 191.

At bar, LCI was the owner of the lease/conditional sale contracts and was entitled to all payments thereunder. FNCB had only a consensual lien or security interest. The master

* 49 U.S.C. §1403(d) states:
"Each conveyance or other instrument recorded by means of or under the system provided for in subsection (a) or (b) of this section shall from the time of its filing for recordation be valid as to all persons without further or other recordation."

"Loan and Security Agreement" between LCI and FNCB stated that the "leases" were assigned as collateral, that LCI conveyed to FNCB a "security interest in the Lease(s) and the property leased," and that "the creation of such security interest(s) [was] as collateral security..." (A60). In the Marrs and Marshall cases, supra, the defendants no longer owned the property. In New York, since LCI owned the property, it was subject to attachment or levy. See CPLR §§5201, 5202 and 6202. The contest at bar concerns the priority between FNCB's consensual lien and the trustee's attachment or execution lien. That priority conflict is specifically determined under New York law by UCC §9-301. A "lien creditor" includes "a creditor who has acquired a lien on the property involved by attachment levy or the like..." as well as a trustee in bankruptcy. See supra, at 14. The attaching or executing creditor has a claim to the property superior to that of the holder of an unperfected security interest. UCC §9-301(1)(b).

In the Marrs case, supra, the court wished to protect an innocent purchaser who relied on the state of the record. Feeder owned a Lockheed airplane and sold it

to Rudich, who did not record the bill of sale. Hawthorne sued Rudich, and the defendant, Barbeau, a deputy sheriff, attached the airplane on behalf of Hawthorne. Shortly thereafter Rudich obtained a second bill of sale from Feeder running to Margal. Marrs, without knowledge of the foregoing events, purchased the airplane from Margal, and recorded his title. The court stated:

> "The attachment of the airplane by the defendant secured for the attaching creditor the interest of Rudich, the judgment debtor. If no other rights were involved there can be no doubt that the attachment and subsequent execution sale could not have been challenged by either Feeder, the seller, or Rudich, the purchaser...Rudich had a title good between himself and Feeder. But it was a defeasible title and ceased to exist when Feeder or in any event Margal exercised the power conferred by statute to put title in another. The attachment likewise fell, for the attaching creditor stood in Rudich's shoes." Id., 146 N.E.2d at 356, 357.

In the Marrs case the court reluctantly determined priorities between two innocent parties who had taken every possible legal step to protect their respective interests. The court's decision could have gone either way. At bar the conflict is not between diligent innocents, but is between a §70c trustee who is deemed to be a diligent judgment lien

creditor, and a secured creditor who failed to protect its secured position due to its own negligence.

Other distinctions stand out. FNCB is not an innocent purchaser. FNCB did not record its interest. FNCB is a creditor of LCI. Its claim for preferential treatment vis a vis other creditors is contractual and limited by statute. As observed by Judge Neaher in his recent determination of an aircraft priority dispute between a chattel mortgagee and the holder of a bailee's lien:

> "...failure to federally record a recordable instrument would entail the specific consequences declared by §1403(c)..." Industrial National Bank of Rhode Island v. Butler Aviation International, Inc., supra, 370 F. Supp. at 1017.

FNCB must bear the consequences of its failure to record.

F. The trustee is entitled to the post-petition chattel paper proceeds. Bankruptcy Act §70c, 11 U.S.C.

§110c, invests the trustee with hypothetical lien creditor status as of the date of bankruptcy. That date at bar is August 18, 1970. See Bankruptcy Act §1(13), 11 U.S.C. §1(13). FNCB's right to the payments received by it under these assignments after that date is invalid against the trustee, and the trustee is entitled to recover such payments with interest from the respective dates of receipt.

Point II

THE THREE LEASES ARE CONDITIONAL SALE CONTRACTS

The Federal Aviation Act of 1958 contains its own definition of "conditional sale" which is clearly applicable to the recording provisions contained in that statute. Western Union Telegraph Co. v. Lenroot, 323 U.S. 490 (1945); Porter v. Bledsoe, 159 F.2d 495 (4th Cir. 1947). Section 101(16), 49 U.S.C. §1301(16) provides:

> "As used in this chapter, unless the context otherwise requires ---
> " 'Conditional sale' means...(b) any contract for ... the leasing of an aircraft ... by which the ... lessee contracts to pay as compensation a sum substantially equivalent to the value thereof, and by which it is agreed that the ... lessee ... had the option of becoming the owner thereof upon full compliance with the terms of the contract."

Thus aircraft leases are conditional sale contracts when the lessee has an option to become the airplane's owner upon fulfillment of its contractual obligations and when its lease obligations are substantially equivalent to the aircraft's value. Each of the three leases granted the lessee

a purchase option. In fact, under the Vieques and Raffa leases the option price was prepaid. Under the True lease, half the option price was prepaid and True actually paid the balance of his contractual obligation, suitably discounted for unearned interest, and presumably took title to the aircraft.

FNCB notes that it contended below "that whether the rentals to be paid under each of these three leases were substantially equivalent to the value of the leased aircraft was a relevant and material fact to be tried (A79)." Appellant's Brief at 5. The trustee disagrees. The resolution of that issue merely requires conclusions to be drawn from uncontested facts.

The price for which LCI purchased each aircraft constitutes the "value" thereof, and is part of the record. The lessees' obligations, both term and amount, are also part of the record.

These projected payments were substantially equivalent to the planes' value plus interest charges to be earned over the five year pay-out period. The following chart consolidates the relevant facts.

	Cost of Plane	Lease Term	Total Payments	Interest Factor
Vieques (A41)	$27,878.00	60 Months	$39,726.00	$11,846.00
Raffa (A43)	43,800.00	60 Months	65,595.00	21,795.00
True (A44)	24,070.00	60 Months	34,299.60	10,299.60

The undisputed facts show that the payments were substantially equivalent to the value of each aircraft. Accordingly, each lease was a conditional sale contract.

Point III

FNCB DID NOT PERFECT ITS SECURITY INTEREST IN THE MONETARY OBLIGATIONS PAYABLE UNDER THE ASSIGNED LEASE INSTRUMENTS BY THE FILING OF UCC FINANCING STATEMENTS AND/OR BY TAKING POSSESSION OF THE INSTRUMENTS BECAUSE PERFECTION COULD ONLY BE ACHIEVED BY FEDERAL RECORDATION OF THE ASSIGNMENTS

FNCB adopts the argument made by counsel for Chase Manhattan Bank, N.A. in the appeal of a companion case (Docket No. 74-1277), Appellants' Brief at 20, that even if the assignments of the lease/conditional sale contracts are invalid against the trustee under the Federal law, the assignment of the payments under the contracts are valid against the trustee under the law of New York because that segment of the overall assignment is governed by state rather than federal law.

In support of this argument FNCB relies solely upon this court's determination of a prior controversy between FNCB and LCI's trustee in bankruptcy, In re Leasing Consultants, Incorporated, 486 F.2d 367 (2d Cir. 1973), which involved equipment leases under the Code and not aircraft. That case held that the Code requires different steps for the perfection of security interests in different kinds of col-

lateral. The Court concluded that if the leases assigned by LCI to FNCB were true leases, as opposed to conditional sales contracts (security agreements under Code terminology), then the security instrument granted FNCB security interests in two kinds of collateral, i.e. the lease contracts classified as "chattel paper" and the lessor's reversion in the leased equipment, classified as "goods." By implication this Court decided that if the leases were conditional sale contracts FNCB's security interest covered only one kind of collateral, i.e., chattel paper. Thus the case was remanded to determine whether the leases were conditional sale contracts or true leases.

As previously demonstrated, the three leases assigned by LCI to FNCB are conditional sale contracts, see Point II, supra, and assignments of the vendor's interest under conditional sale contracts, as at bar, are conveyances which if unrecorded are invalid against the vendor's trustee in bankruptcy, see Point I, supra. Even if the leases are treated as true leases their assignments are recordable conveyances. Feldman v. Chase Manhattan Bank, N.A., supra; see Point I-C supra.

If Code classifications are used at bar, the conditional sale contracts* assigned to FNCB are "chattel paper." These assignments are not, as contended by FNCB, assignments of rentals. There is no such collateral classification in the Code, as there is no such classification under the Federal Act. The Code contains no rules for the perfection of a security interest in "lease rentals" other than the rules for perfection of a security interest in chattel paper.** FNCB would have this court treat the "lease rentals" as "accounts" and "contract rights." But the Code definitions of "accounts" and "contract rights" expressly exclude payments evidenced by an instrument or chattel paper. Code §9-106 states:

> " 'Account' means any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper. 'Contract right' means any right to payment under a contract not yet earned by performance and not evidenced by an instrument or chattel paper...." (Emphasis supplied.)

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* See Official Code Comment to UCC §9-308. The same classification applies if the leases are true leases.

** The Code uses seven collateral classifications, i.e. goods [§9-105(f)]; documents [§9-105(e)]; instruments [§9-105(g)]; general intangibles [§9-106]; accounts [§9-106]; contract rights [§9-106]; and chattel paper [§9-105(b)].

Using Code classifications, FNCB took security interests in chattel paper. That kind of collateral is defined as "...a writing or writings which evidence both a monetary obligation and a security interest in or a lease of specific goods...." U.C.C. §9-105(b). The monetary obligation, i.e., lease payments or the installment payments under a conditional sale contract, is obviously the most important incident of that collateral. Congress and the Administrator have required recordation of the instrument that creates the chattel paper security interest and have created a penalty for failure to record. The assignments are clearly invalid against plaintiff-trustee under Federal law. To hold them valid at the same time under state law would be preposterous.

Moreover, U.C.C. §9-104 declares that Article 9 dealing with secured transactions "does not apply to a security interest subject to any statute of the United States...to the extent that such statute governs the rights of parties to and third parties affected by transactions in particular types of property;...." As previously demonstrated the Federal Aviation Act and the Regulations promulgated thereunder require the filing for recordation of many, if not all,

forms of security devices dealing with interests in aircraft. This includes assignments of a vendor's interest under a conditional sale contract by express regulations, 14 C.F.R. §§49.31(a) and 49.17(d)(2), and assignments of a lessor's interest under a true lease. Feldman v. Chase Manhattan Bank, N.A., supra.

U.C.C. §9-302 reiterates the provisions of U.C.C. §9-104 (a) with emphasis on the perfection issue.

> "(3) The filing provisions of this Article do not apply to a security interest in property subject to a statute...(a) of the United States which provides for a national registration or filing of all security interests in such property; ...
>
> "(4) A security interest in property covered by a statute described in subsection (3) can be perfected only by registration or filing under that statute..."

The Federal Aviation Act and Regulations expressly provide for national filing of all security interests in aircraft conditional sale contracts, and by implication, for national filing of all security interests in aircraft leases. The Code expressly denies its own jurisdiction over such security interests. FNCB's effort to split away the assignment

of monetary obligations from the total interest in chattel paper assigned by LCI to FNCB must fail. To rule otherwise would emasculate the Federal Aviation Act.

Point IV

THE TRUSTEE'S SUIT IS NOT TIME BARRED

A. The trustee had six years within which to commence this law suit since the appropriate statute of limitations is, as found by District Judge Bauman (A57), New York CPLR §213(1). FNCB maintains that the suit is governed by a two year statute of limitations appearing at Bankruptcy Act §11e, 11 U.S.C. §29e. The trustee's position is supported by the clear language of Bankruptcy Act §11e, 11 U.S.C. §29e, which provides that:

> "A receiver or trustee may, within two years subsequent to the date of adjudication or within such further period as the Federal or State law may permit, institute proceedings in behalf of the estate upon any claim against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition in bankruptcy...." (Emphasis supplied).

The leading bankruptcy treatise restates the clear meaning of that statutory language:

> "....If the cause of action arises under a federal statute other than the Bankruptcy Act and the period of limitations in that statute is longer than two years, that period applies....if the cause of action arises under state law and if the period of limitations expires after the two year period of §11e, then the State period of limitations applies." 1A Collier on Bankruptcy, ¶11.13[2] at 1207-9 (14th ed. 1973).

The trustee's causes of action arise under Federal Aviation Act §503c, 49 U.S.C. §1403c. As stated by Justice Holmes:

> "....A suit arises under the law that creates the cause of action...." American Wall Works Co. v. Layne and Bowler Co., 241 U.S. 257, 260 (1916).

It is Federal Aviation Act §503c, 49 U.S.C. §1403c, that declares the unrecorded assignments invalid.

As noted by District Judge Bauman, the Federal Aviation Act does not contain a statute of limitations. (A87). As stated by Justice Frankfurter, the local limitation will be applied:

> "If Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter. The Congressional statute of limitation is definitive. * * * * The

> rub comes when Congress is silent. Apart from penal enactments, Congress has usually left the limitation of time for commencing actions under national legislation to judicial implications. As to actions at law, the silence of Congress has been interpreted to mean that it is federal policy to adopt the local law of limitation. See Campbell v. Haverill, 155 US 610, 39 L ed 280, 15 S Ct 217; Chattanooga Foundry & Pipe Works v. Atlanta, 203 US 390, 51 L ed 241, 27 S Ct 65; Rawlings v. Ray, 312 US 96, 85 L ed 605, 61 S Ct. 473...." Holmberg v. Armbrecht, 327 U.S. 392, 395 (1946).

The Supreme Court has reiterated this holding in International Union v. Cardinal Hoosier Corporation, 383 U.S.696, 704 (1966) with Justice Stewart stating that since 1895 "... state statutes have repeatedly supplied the periods of limitations for federal causes of action when federal legislation has been silent on the question...." See also Vanderboom v. Sexton, 422, F.2d 1233, 1237 (8th Cir. 1970) and International Union v. Fischbach and Moore, Inc., 350 F.2d 936, 938 (9th Cir. 1965). Thus Moore's statement is on a solid foundation.

> "If the right is one created by the federal government and there is an applicable federal statute of limitations, it will control. Where a federally created right is involved but there is no federal statute of limitations, state law will determine the applicable limitation period in actions formerly denominated logal;..." Moore's Manual: Federal Practice and Procedure, §10.02[4] at 604.1-605 (1973).

See also Fratt v. Robinson, 203 F.2d 627, 634 (9th Cir. 1953)

[State limitations applied to fraud action under Securities Exchange Act, which did not contain an applicable limitation period.]

The District Court's application of New York law was thus correct.

> "....Plaintiff's challenge to defendant's purported security interest under 49 U.S.C. §1403(c) might conceivably fall into three different categories: an action for monies had and received, to set aside a conveyance of personalty, or upon a constructive trust, CPLR §213(1). All are governed by the residual six year statute contained in CPLR §213(1)...." (A87).

B. The courts have uniformly refused to use Bankruptcy Act §11e to limit a trustee's suit using his creditor status, where the trustee would have a longer period under applicable federal or state law. In MacLeod v. Kapp, 81 F. Supp. 512 (S.D.N.Y.1948) the trustee sought "to set aside an alleged preferential transfer under Section 15 of the New York Stock Corporation Law..." The defendant urged that Bankruptcy Act §11e, 11 U.S.C. §29e, barred the suit because it was commenced more than two years subsequent to adjudication. The court distinguished the Supreme Court's decision in Hegret v. Central National Bank & Trust Co., 324 U.S. 4

(1945) and denied the motion to dismiss stating:

> "....However, a reading of [the Hegret] case reveals that it is not applicable here. The cause of action in the Herget case arose under section 60 of the Bankruptcy Act, 11 U.S.C.A. §96, as the Supreme Court said: 'Here the only applicable law is Section 60 of the Bankruptcy Act, which generates the cause of action and which contains no time limitations as to actions brought pursuant thereto.'
>
> "And further the Court said: 'Inasmuch as the federal Bankruptcy Act has created the liability and has also fixed the limitation of time for commencing actions to enforce it, we have no occasion to consider the trustee's arguments concerning the applicability and construction of the Illinois statute of limitation.'
>
> "As stated above, this action was instituted under Section 15 of the New York Stock Corporation Law. And the statute of limitations applicable thereto is Section 48 of the New York Civil Practice Act--a six year statute....
>
> "If the words 'or within such further period of time as the Federal or State law may permit' are to be given any effect, they must mean that this action, based on a state statute, is to be governed by the applicable New York State statute of limitations. McBride v. Farrington, D.C.. 1945, 60 F. Supp. 92, affirmed D. C. 156 F.2d 971. Consequently the action is not barred by the two year statute in the Bankruptcy Act." Id., 81 F. Supp. at 513.

Likewise, in Halpert v. Engine Air Service, Inc., 116

F. Supp. 13 (E.D.N.Y. 1953) the court refused to impose a two year limitation on a trustee's creditor derived action where the state law permitted a longer time period, stating that"

> "....While the plaintiff would be barred from recovery on any cause of action founded on Sections 60 and 67 or either of them by Section 11, sub e, as construed in Herget v. Central Nat. Bank & Trust Co., * * * * he is not precluded from pursuing causes of action grounded on State law and which are not barred by the limitation of time provisions prescribed by State law. MacLeod v. Kapp, D.C., 81 F. Supp. 512." Id., 116 F. Supp. at 15.

This rationale was reiterated time and time again in Schutte v. Wittner, 149 F. Supp. 451, 452 (E.D.N.Y. 1957), in Harrington v. Yellin, 158 F. Supp. 456, 458-459 (E.D. Pa. 1958), in Priebe v. Svehlek, 245 F. Supp. 743, 745 (E.D.Wis. 1965) and in Buchman v. American Foam Rubber Corporation, 250 F. Supp. 60, 65, 71 (S.D.N.Y. 1965). See also Hummel v. Equitable Life Assur. Soc., 151 F.2d 994, 997(7th Cir.1945), and McBride v. Farrington, 60 F. Supp. 92 (D. Ore. 1945), aff'd. 156 F.2d 971 (9th Cir. 1946).

In the Buchman case, supra, the court noted:

> "The elements of the cause of action to which a trustee becomes subrogated under Section 70, sub e, of the Act are not determined by the Bankruptcy Act, but rather by state law, or federal law other than the Act. Upon the grounds of avoidance under federal or state law, the Trustee may avoid any transfer by the bankrupt which any creditor of the bankrupt could have avoided....[citations omitted.]" Id., 250 F. Supp. at 65.

The same rationale applies to a trustee's causes of action under Section 70, sub c. While the trustee is asserting the rights of a hypothetical creditor, the trustee must be considered to be such a creditor, as if such a creditor actually existed. The trustee's standing to sue would depend on the standing of this hypothetical creditor and the avoidability of an affirmative defense such as the statute of limitations must receive the same treatment.

Thus if x acquired a judgment lien against LCI on August 18, 1970 and commenced suit against FNCB on April 18, 1973 seeking to invalidate the three chattel paper assignments under 49 U.S.C. §1403c, would x be time barred by §11e of the Act? It is obvious that no provision of the Bankruptcy Act is applicable to the suit by x against FNCB. The rule set forth in Holmberg v. Armbrecht, supra, would direct the district court to apply the applicable six

year state limitation.

C. FNCB's reliance on the Supreme Court's decisions in the Hegret case and Lewis v. Manufacturers National Bank of Detroit, 364 U.S. 603 (1961) is misplaced. The Herget case, supra, decided "the narrow issue of whether §11e...bars at the end of two years from the date of adjudication in bankruptcy an action brought by the trustee in a bankruptcy to set aside and recover a preferential transfer." 324 U.S. at 5. The trustee maintained that the suit was governed by a five year Illinois statute. In finding the two year period of §11e the applicable limitation period for s suit to set aside a voidable preference, the Supreme Court stated:

> "Here the only applicable law is §60 of the Bankruptcy Act, which generates the cause of action and which contains no time limitations as to actions brought pursuant thereto....
> "Inasmuch as the federal Bankruptcy Act has created the liability and has also fixed the limitation of time for commencing actions to enforce it, we have no occasion to consider the trustee's arguments concerning the applicability and construction of the Illinois statutes of limitation." 324 U.S. at 9.

In summary, the Supreme Court hald that since the statute that "generate[d] the cause of action" and "created the liability" contained a limitation period, that limitation

period must apply to that cause of action. The same rationale has been applied to the cause of action generated by §67 of the Bankruptcy Act. Samuels v. Kockos Bros., Ltd., 307 F. 2d 147 (9th Cir. 1962), cert. den. 371 U.S. 934(1962); Wells v. Place, 92 F. Supp. 477 (N.D. Ohio 1950).

But as previously demonstrated that rationale does not apply to the trustee's action under Section 70 of the Act, and the courts have continually distinguished that case based upon a determination of whether the cause of action arose under the Bankruptcy Act or under non-bankruptcy law. As demonstrated by the brief hypothetical at page 37, supra, the trustee's causes of action do not arise under the Bankruptcy Act, even though that Act gives the trustee his standing to maintain this suit.

The Lewis case, supra, involved an attempt by a trustee to relate his Section 70c hypothetical creditor status back to a pre-petition period as had been permitted in Constance v. Harvey, 215 F.2d 571 (2d Cir. 1954), cert. den. 348 U.S. 913 (1955) and Conti v. Volper, 229 F.2d 317 (2d Cir. 1956). The court fixed the accrual of a trustee's §70c as of the

date of petition filing. 364 U.S. at 607. The case was concerned with the purported existence of a hyper-technical defect in the bank's security interest in that four days had elapsed between the granting and recordation of a chattel mortgage. At bar, FNCB failed to record. In Lewis, the statute of limitations was not at issue. Notably, Justice Murphy quotes the following Congressional History of §70c with approval.

> "It is evident that in the proposed amendment attempt is made to give effect to two ideas quite distinct: First, that as to the property in the custody of the bankruptcy court the bankruptcy trustee shall be considered to have the same title that a creditor holding an execution or other lien by legal or equitable proceedings levied upon that property would have under state law: and, second, that as to property not in the custody of the bankruptcy court the trustee should stand in the position of a judgment creditor holding an execution returned unsatisfied, thus entitling him to proceed precisely as an individual creditor might have done to subject assets. In this way, in effect, proceedings in bankruptcy will give to creditors all the rights that creditors under the state law might have had had there been no bankruptcy and from which they are debarred by the bankruptcy--certainly a very desirable and eminently fair position to be granted to the trustee." HR Rep No. 511, 61st Cong, 2d Sess, p. 7. 364 U.S. at 605, n.2. (Emphasis supplied.)

This adds further support to the trustee's assertion that §11e is inapplicable.

As noted by Judtice Day in discussing §70e of the Act:

> "...in view of the provisions of §70e of the Bankruptcy Act, Congress did not intend to permit a conveyance such as is here involved to stand which creditors might attack and avoid under state law for the benefit of general creditors of the estate." Stellwagen v. Clum, 245 U.S. 605, 618 (1918).

It would be equally appropriate to substitute §70c for §70e and federal non-bankruptcy law for "state law."

Accordingly, FNCB's motion to dismiss based on Bankruptcy Act §11e, 11 U.S.C. §29e, was properly denied by the District Court.

CONCLUSION

THE JUDGMENT BELOW MUST BE AFFIRMED.

Respectfully submitted,

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AFFIDAVIT OF SERVICE

Re: 74-1893
George Feldman, etal v. First National City Bank

STATE OF NEW JERSEY :
: ss.:
COUNTY OF MIDDLESEX :

I, Muriel Mayer, being duly sworn according to law, and being over the age of 21 upon my oath depose and say that: I am retained by the attorney for the above named Plaintiff-Appellee.

That on the 21st day of October, 1974, I served the within Brief for Plaintiff-Appellee in the matter of George Feldman, etal v. First National City Bank, upon Zalkin, Robin & Goodman, Esqs., 750 Third Avenue, New York, New York 10017, by depositing two (2) true copies of the same securely enclosed in a post-paid wrapper, in an official depository maintained by the United States Government.

Muriel Mayer
Muriel Mayer

Sworn to and subscribed before me this 21st day of October 1974.

Lorraine Leotta
A Notary Public of the State of New Jersey.

LORRAINE LEOTTA
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires April 13, 1977.